APPENDIX A

OPINION OF THE DISTRICT COURT

The Court: There is no question as to the constitutionality of the statute under which the proceeding here involved was conducted.

The only question is whether the statutory requirements were complied with and that in turn depends on the definition of what constitutes "a fair and impartial hearing before a board of inquiry" as provided in 10 U.S. Code 8782, subsection (b).

The Court has no doubt that the hearing in this instance was impartial.

It is argued however on behalf of the plaintiff that the words "fair hearing" would bar the use and the introduction in evidence of ex parte written statements of accusing witnesses, for not being produced to testify orally either at the hearing or by deposition, there is no opportunity, therefore, to cross-examine.

Now it must be said at the outset that a fair hearing does not mean that all the common-law rules of evidence must be observed.

The requirement means, as the Court sees it, that the fundamentals must be observed and the Court is of the opinion that in the traditions of Anglo-American jurisprudence to find a person guilty of a serious dereliction of any kind where part of the testimony against him consists of ex-parte written statements does not constitute a fair hearing, as we use that term.

The fact that there was other evidence in the case which was sufficient to sustain the charges does not change the result.

There was evidence both ways. We do not know but that the statements in question might have swung the result.

The Court appreciates that there are practical difficulties in producing witnesses at these proceedings because there is no provision for compulsory process, although one might well believe that if Congress were requested to give such authority it would be forthcoming.

But it seems to the Court that since there was other evidence supporting the charges procured from live witnesses who were produced, the ex parte statements should have been excluded.

This is not a case of a minor infraction tried in an intramural proceeding such as Captain's Mast in the Navy or disciplinary punishment by a company commander.

This involves a very serious charge, namely, falsification of records.

The Court is of the opinion that it was an error that went to the very roots of a fair hearing to introduce ex parte statements of witnesses which constitute part of the evidence against the plaintiff.

The Court was very much impressed by the able argument of counsel for the Government. It always is, but he had a very difficult burden to carry in this case, and he carried it well.

Whatever result this Court is going to reach in this proceeding does not prevent the Air Force from bringing another proceeding and conducting it in accordance with this Court's interpretation of the statute.

In view of these considerations, the plaintiff's motion for summary judgment is granted and defendant's motion is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided March 30, 1967

Before BAZELON, *Chief Judge*, BURGER, *Circuit Judge*, and EDWARDS,* *Circuit Judge* for the United States Court of Appeals for the Sixth Circuit.

EDWARDS, *Circuit Judge:* In this case Lieut. Col. Leonard A. Gamage appeals from his compelled discharge from the active service of the United States Air Force. The Board of Inquiry which heard and sustained charges against him of falsifying weather reports accorded him an honorable discharge with retirement pay.

In the declaratory judgment proceedings brought before the United States District Court by appellee Gamage, the United States District Judge held that Col. Gamage had not been given a "fair hearing." He held the discharge to be "null and void" for failure to observe the statutory requirement of 10 U.S.C. § 8792(b) (1964), which provides for "a fair and impartial hearing before a board of inquiry."

The United States District Judge held "[T]o find a person guilty of a serious dereliction of any kind where part of the testimony against him consists of *ex parte* written statements does not constitute a fair hearing, as we use that term. . . ." He directed the Secretary of the Air Force to restore appellee to active duty.

The District Judge found no failure on the part of the Air Force to provide Gamage with an "impartial" hearing. Nor do we.

The District Judge's findings as to "unfairness" were based entirely upon the admission of statements taken by

* Sitting by designation pursuant to Section 291(a), Title 28 U.S. Code.

the Air Force, without participation of Gamage or his counsel in the taking of such statements. These statements were admitted against Gamage in the course of the hearing without the persons who had made them being produced at the hearing themselves. This, of course, raises the classic case of failure of opportunity for confrontation familiar in criminal trial proceedings. *Pointer* v. *Texas*, 380 U.S. 400 (1965).

We do not, however, deal here with a criminal trial. The hearing with which we are concerned is an administrative procedure calculated to determine the employment rights of an Air Force officer. In addition, we deal with all of the complex additional problems posed by the fact that the agency involved is one of the military services of the United States. Clearly, Gamage has no constitional right to active duty as an Air Force Lieut. Colonel. Clearly, also, we do not review this discharge against the constitutional standard of the Sixth Amendment of the United States Constitution, since by specific language it applies "in all criminal prosecutions." U.S. Const. amend. VI.

But Congress has provided by applicable statute for a "fair and impartial hearing." These words we assume should be interpreted as they were used—to apply to an administrative hearing in a military service.

Facts which are relevant to our decision include the following: Four of the five witnesses whose *ex parte* statements were introduced were retired or inactive Air Force personnel. The fifth was an officer on active duty in England at the time of the hearing. Their statements (or certainly some of them) were material to the issues posed by the charges against appellee. Eighteen witnesses were present in person and subject to cross-examination, and their testimony covered the same general charges. It is also true, however, that the testimony for appellee concededly created a dispute of fact as to these issues which the Board of Inquiry had to resolve. Clearly, the *ex parte* statements were before the Board for consideration and they could have prejudiced the result.

The statute which we are called upon to construe provides:

"§ 8792. *Boards of inquiry: composition; duties.*

"(a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Air Force may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 8791 of this title, shall be retained on the active list of the Regular Air Force.

"(b) A *fair and impartial hearing* before a board of inquiry shall be given to each officer so required to show cause for retention.

"(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.

"(d) If a board of inquiry determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 8791 of this title." Chapter 860, Title 10, U.S.C. § 8792. (Emphasis added.)

"§ 8793. *Boards of review: composition; duties*

"(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Air Force, at such times as he may prescribe, to review the records of cases of officers recommended by board of inquiry for removal from the active list of the Regular Air Force under section 8792 of this title.

"(b) If, after reviewing the record of the case, a board of review determines that the officer has failed to establish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

"(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his

case is closed. However, at any future time, he may be again required to show cause for retention under section 8791 of this title." Chapter 860, Title 10, U.S.C. § 8793.

"§ 8795. *Rights and procedures*

"Each officer under consideration for removal from the active list of the Regular Air Force under this chapter shall be—

"(1) notified in writing of the charges against him, at least 30 days before the hearing of his case by a board of inquiry, for which he is being required to show cause for retention on the active list;

"(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Air Force, to prepare his defense;

"(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

"(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceedings, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security.

"In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld." Chapter 860, Title 10, U.S.C. § 8795.

The statute has been followed in detail by the regulations—except, of course, it may be argued that any material and disputed statement admitted without cross-examination destroys the "fairness" of any hearing.

The regulations (1957 Air Force Regulations, 36-2—See App. A) do provide for full notice of charges and of any adverse statements to be offered. They "encourage" the Board to invite material witnesses who are "reasonably available" to appear. They provide for the Air Force to require the presence of witnesses who are on active duty,

provided "military requirements permit." They provide for the Board to "invite" witnesses who are civilians or members of Reserve components, but each such witness invited is told that his expenses are not reimbursable. Section 18(d) of the Regulations also provides:

> "The legal adviser to the board may interrogate witnesses and otherwise assist the board so that the record will be as complete as possible to make sure that all pertinent information favorable as well as unfavorable to the respondent is brought to the attention of the board and made a matter of record. The legal adviser is in no way to be considered a prosecutor and will not conduct himself as one."

The Regulations appear to have been followed explicitly by the Board of Inquiry. Cf. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957).

This record discloses that the disputed *ex parte* statements were part of a lengthy file made available to appellee well before the hearing. No records were withheld from appellee. Appellee was given requested adjournments in order to prepare his defense, and the site of the hearing was transferred from Illinois to California at his request also.

Appellee was furnished with both the statements from and addresses of the five officers and men. Appellee was told that statements, affidavits and depositions which he desired to submit would not be objected to, and that the list of names "should be of assistance in contacting any potential witnesses for purposes of obtaining depositions for the Board of Inquiry." Subsequently, the Recorder of the Board of Inquiry met with counsel for appellee to discuss the availability of witnesses. No request was made for Air Force assistance in the taking of depositions, and appellee did not submit any statements, affidavits or depositions from the five parties whose statements are in dispute.

It is conceded that the only one of the five witnesses whom the Air Force could have compelled to testify (by ordering him back from England where he was stationed on active duty) was not asked for by appellee. The four

whose presence as adverse witnesses was requested by appellee were requested by the Recorder of the Board of Inquiry to appear at the hearing. Each refused. It is conceded that none of these witnesses (all retired Air Force personnel) could have been compelled to appear and testify.

At the conclusion of the hearing counsel for appellee entered in the record an acknowledgment that the Recorder "has done an excellent job, and has made a diligent effort to procure the witnesses that [appellee's counsel] requested."

In summary, as to the disputed statements from the five Air Force officers and men, appellee did not seek the presence of the only witness, Major Trevorrow, whose presence the Air Force could have compelled. He did not request assistance of the Air Force in his taking the depositions of the four other men to whose statements he objected. Nor did he offer any statements, affidavits or depositions from them as a result of direct contact with them. We note additionally that appellee makes no claim that financial or other factors rendered contact with the five officers and men an impossibility for him.

The issues involved in this case are substantial ones. If we declare that a "fair" hearing in the context of this statute requires physical presence and cross-examination at the hearing, then either Congress must amend the statute to supply the Air Force the missing subpoena power, or the Air Force may be completely deprived of testimony from retired, inactive, or discharged personnel (arguably vital in some cases). On the other hand, we are by no means unimpressed with the fact that issues of material importance to appellee's present and future standing were decided by Air Force Board of Inquiry and that Congress plainly provided that such action be taken only after "a fair and impartial hearing."

The general rule in relation to administrative hearings does not bar all hearsay. 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1964), *Vitarelli* v. *Seaton*, *supra* at 540.

The primary concern of the courts in the cases most relied upon by the appellee has been to guarantee the element of "fairness" which is involved in full disclosure of charges

and adverse statements with identification of the sources of same so that the accused could effectively prepare a defense. *Vitarelli* v. *Seaton, supra; Willner* v. *Committee on Character*, 373 U.S. 96 (1963); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

In this last case the United States Supreme Court said:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . ." *Greene* v. *McElroy, supra* at 496.

It is certain that the statute, the regulations and the procedures followed by the Board of Inquiry in this case fully matched the standards of disclosure and discovery set forth in the cases cited above.

Greene v. *McElroy, supra*, however, also stands generally for the proposition that "in the absence of explicit authorization from either the President or Congress" an administrative hearing which does not afford "the safeguards of confrontation and cross-examination" does not "comport with our traditional ideas of fair procedure." *Greene* v. *McElroy, supra* at 508. This case, of course, did not deal with the military service nor was the penalty therein imposed the retirement from active service of an officer who was accorded honorable discharge and retirement pay. Arguably, too, in the instant case (as opposed to *Greene*), there was "explicit authorization from . . . Congress" of the procedure employed by the Air Force in this hearing.

More important to our decision, however, is the fact that appellant herein had procedural rights (which were never accorded in the *Greene* case!) which he knowingly failed to employ.

In the second *Williams* case (*Williams* v. *Zuckert*, 372 U.S. 765 (1963)), the United States Supreme Court vacated a judgment of the Court of Appeals and remanded the case to the District Court for a hearing to determine "whether

the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations *by making timely and sufficient attempt to obtain their presence* or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses for cross-examination. . . .'' *Williams* v. *Zuckert, supra* at 765. (Emphasis added.)

In the order of the District Judge, there is this finding: "[T]he defendant failed to comply with the requirement of 10 U.S.C. 8792(b) in denying plaintiff a fair hearing before an Air Force Board of Inquiry, when there was introduced in evidence against the plaintiff and over the timely objection of his counsel, *ex parte* written statements of accusing witnesses who were not made available to plaintiff for cross examination, *either by way of depositions* or during the hearing.'' (Emphasis added.)

We believe the District Judge was in error in his construction of the stipulated record. Important additional proceedures for seeking a form of cross-examination of all five persons whose statements are the subject of this dispute were available to appellee. His failure to request the presence of Major Trevorrow and his failure to take depositions or statements from the other four, or to request the aid of the Air Force in arranging to take their depositions or statements, allows the inference that he was aware of the adverse nature of their testimony. Under these circumstances we cannot agree that admission of their statements deprived him of a "fair'' hearing within the meaning of the Congressional enactment under which the Board of Inquiry acted.

Reversed and remanded for dismissal of the complaint.

APPENDIX C

STATUTE AND REGULATIONS INVOLVED

1. Chapter 860, Title 10, United States Code, provides in pertinent part:

> SEPARATION FROM REGULAR AIR FORCE FOR MORAL OR PROFESSIONAL DERELICTION OR IN INTERESTS OF NATIONAL SECURITY
>
> § 8791. Selection boards: composition; duties.
>
> The Secretary of the Air Force may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Air Force to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.
>
> § 8792. Boards of inquiry: composition; duties.
>
> (a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Air Force may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 8791 of this title, shall be retained on the active list of the Regular Air Force.
>
> (b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.
>
> (c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.
>
> (d) If a board of inquiry determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future

time, he may be again required to show cause for retention under section 8791 of this title.

§ 8793. Boards of review: composition; duties.

(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Air Force, at such times as he may prescribe to review the records of cases of officers recommended by boards of inquiry for removal from the active list of the Regular Air Force under section 8792 of this title.

(b) If, after reviewing the record of the case, a board of review determines that the officer has failed toestablish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 8791 of this title.

§ 8794. Removal of officer: action by Secretary of the Air Force upon recommendation.

The Secretary of the Air Force may remove an officer from the active list of the Regular Air Force if his removal is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive.

§ 8795. Rights and procedures.

Each officer under consideration for removal from the active list of the Regular Air Force under this chapter shall be—

(1) notified in writing of the charges against him, at least 30 days before the hearing of his case

by a board of inquiry, for which he is being required to show cause for retention on the active list;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Air Force, to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interest of national security.

In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

2. The 1957 Air Force Regulations 36-2 governing the Elimination or Release of Officers from Active Duty by Reason of Unfitness, Unacceptable Conduct, or Inefficiency, provided in pertinent part:

* * * * * * *

16. *Briefing the Board of Inquiry.* The major air commander or his designated representative will, before the board convenes, brief the board members regarding their responsibility to carry out the policies announced in this regulation and in the guidance manual. This briefing, among other matters, should emphasize that the show cause hearing is administrative in nature and is not subject to the rules and procedures governing court action. Further, that the case as presented to the board by the major air commander is based on a determination of a board of senior Air Force officers, or in the case of a nonprobationary Regular commissioned officer, a board of five general officers that the respondent is required, because of

failure to achieve the prescribed standards of performance, to show cause for his retention in the Air Force. The burden rests with the respondent to present evidence to refute, rebut or mitigate the evidence presented by the government.

17. *Rights a Respondent Has.* An officer appearing as a respondent before a board of inquiry will have the following rights:

a. He may present evidence and appear in person with or without counsel. If he does not appear in person, he will be represented by counsel at all open proceedings of the board of inquiry. However, he will not be reimbursed for expenses in connection with the appearance or assistance of civilian counsel.

b. He may request that any witness appear before the board of inquiry if he believes testimony of the witness will be pertinent to the case. The board will honor the request if it considers the witness to be reasonably available and his testimony can add materially to the case. However, he will not be reimbursed for expenses in connection with the appearance or assistance of civilian witnesses or military personnel not serving on extended active duty.

c. He may challenge for *cause only* any voting member of the board of inquiry.

d. He or his counsel may question any witness brought before the board of inquiry.

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g. At all stages of the proceedings of the board of inquiry, he will be allowed full access to and will be furnished copies of records which the board considers relevant to his case except certain classified, medical or professional reports.

• • • • • • •

18. Conduct and Action of the Board of Inquiry:

• • • • • • •

c. The board is encouraged to invite witnesses to appear if the witnesses are reasonably available and if, in the opinion of the board, their testimony is essential or will contribute materially to the case. Whenever practical in cases involving substandard performance, arrangements will be made for the respondent's immediate commander or the individual responsible for preparing his effectiveness report (AF Form 77) to appear as a witness before the board of inquiry. The board will contact witnesses in the following manner:

(1) The president of the board will invite witnesses who are civilians or members of the Reserve components of the Air Force not on extended active duty to appear before a board. Each witness will be informed that the board cannot reimburse him for expenses incurred in connection with his appearance before the board.

(2) The major air commander concerned will, when so requested by the board and provided that military requirements permit, make witnesses available who are military persons serving on the active list or on extended active duty. Direct communication between major air commands is authorized when required. Travel of military witnesses should be limited to official military transportation. In instances where official military transportation is not available, commercial means will be used. Funds for reimbursement of travel will be provided from resources available to the major air commander. The use of affidavits or depositions to obtain testimony of witnesses who are not reasonably available is encouraged.

d. The legal adviser to the board may interrogate witnesses and otherwise assist the board so that the record will be as complete as possible to make sure that all pertinent information favorable as well as unfavorable to the respondent is brought to the attention of the board and made a matter of record. The legal adviser is in no way to be considered a prosecutor and will not conduct himself as one.

APPENDIX D

ILLUSTRATIVE EX PARTE STATEMENTS

Illustrative, but not all, of the testimony, taken without notice to the appellee and out of his presence and that of his counsel, which was received in evidence over appellee's objection by the Board of Inquiry, are the following statements:

1. "These [records] were all made up just prior to the inspector's arrival * * * Capt. Boyce and I were told to do this . . . directly by Col. Gamage." (J.A. 56).[1]
2. "Yes, sir, I have . . . been threatened . . . by Col. Gamage." (J.A. 59).[2]
3. "He (Gamage) borrowed my pen . . . to initial these [fabricated] forms." (J.A. 63).[3]
4. "My opinion of Lt. Col. Gamage is that he is a lazy pathological liar. I have several instances to cite." (J.A. 65).[4]
5. Subordinates in Col. Gamage's weather detachment command "were . . . instructed to lie for Lt. Col. Gamage . . ." (J.A. 68).[5]
6. "Lt. Col. Gamage gave me a direct order to fabricate Severe Weather Warnings and Met Watch Advisories. It is possible that the fabrication of this material was done in a deliberately careless manner to aid detection by the inspectors." (J.A. 71).[6]
7. ". . . Colonel Gamage has threatened to frame people who did not go along with him . . . [he had] bragged how he framed three enlisted men at other weather stations . . ." (J.A. 79).[7]

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[1] Sworn, *ex parte*, testimony of Sgt. Minga.

[2] *Ibid.*

[3] *Ibid.*

[4] Unsworn, *ex parte*, statement of Capt. Boyce.

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

8. Col. Gamage committed "outright lies in almost every phase of his duty." (Witness paused, threw up his hands). (J.A. 80).[8]
9. ". . . I have prepared falsified documents and records for Lt. Col. Gamage . . ." (J.A. 83).[9]
10. Col. Gamage "lies all of the time . . ." (J.A. 83).[10]
11. "The Colonel asked me first to sign these [forged records] and I refused and he told Sgt. Dalton to sign them." (J.A. 95).[11]
12. ". . . he (Gamage) [told me] he would frame them. (J.A. 100).[12]
13. "I did not question the DETCO (Lt. Col. Gamage) after finding the records had been falsified . . . at the direction of the DETCO." (J.A. 101).[13]

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[8] Sworn, *ex parte,* testimony of Capt. Boyce.

[9] Unsworn, *ex parte,* statement of Airman Ramirez.

[10] *Ibid.*

[11] Sworn, *ex parte,* statement of Airman Ramirez.

[12] Unsworn, *ex parte;* statement of Capt. William C. Trevorrow.

[13] *Ibid.*

APPENDIX E

EXTRACTS FROM THE LEGISLATIVE HISTORY OF S. 1795

A. *Hearings on S. 1795 Before a Subcommittee on the Senate Committee on Armed Services*, 86th Cong., 1st Sess., June 17, 1959:

1. At p. 29 thereof, the following exchange occurred between Senator Cannon and Charles Finucane, Assistant Secretary of Defense for Manpower, Personnel and Reserve:

> "*Senator Cannon.* Could I ask one further question that has occurred to me?
>
> "Mr. Secretary, if this bill has as its purpose the elimination of substandard officers, why can't they be eliminated under the present law under show-cause procedure?
>
> "*Mr. Finucane.* This is not a—this is not necessarily an elimination of officers that would be subject to a show-cause procedure. This is a carrying on of a program of last year's pay increase that we were going to have an officer proficiency arrangement where you could, if you wanted to, eliminate some of your weak officers without 'showing cause'.
>
> "In other words, between all humans there is a degree of effectiveness and *when you get into a show-cause, you are inferring, at least, that the man has done something wrong.** This is not aimed at that at all. The mere fact that he has been passed over twice indicates that he probably is not quite as good as somebody else who was not passed over."

2. In his statement before the Senate Committee, General Curtis LeMay, Vice Chief of Staff of the United States Air Force, said, at pp. 31-32 thereof, that:

> "The only existing law available to remove these officers prior to 28 or 30 years' service is found in

* Italics supplied throughout this appendix.

section 8781, title 10, United States Code. *The use of this authority has historically been limited in the Air Force to those cases involving substandard performance of duty or misconduct.* It is not considered appropriate for use in the case of those officers whose primary failing is their inability to keep pace in the increasingly complex environment in which they find themselves." (pp. 31-32)

3. Major General J. J. Nazzaro, Director, Personnel Planning, U. S. Air Force, advised the Senate Committee that:

"Third, the proposed law would authorize the Secretary to involuntarily retire certain permanent colonels and lieutenant colonels. Present law guarantees 28 years of service for permanent lieutenant colonels and 30 years of service for permanent colonels, unless they are involuntarily removed under section 8781 of title 10, United States Code. As has been previously mentioned *the use of this authority in the Air Force has been limited to cases involving substandard performance of duty or misconduct. It is not considered appropriate for use* in the case of officers whose primary failing is their inability to keep pace in the increasingly complex environment in which they find themselves." (P. 36)

4. Later on General Nazzaro told the Committee:

"Yet, under existing law, it is almost impossible to eliminate an officer for *other than misconduct or gross negligence.*" (p. 39)

5. In concluding his testimony, as found at p. 46 of the Senate Hearings, General Nazzaro stated:

"As General LeMay pointed out, we think it is something that will give us a better management tool than we have today. The only way we can eliminate a regular officer over 20 years involuntarily is by court martial or by title 10 of United States Code, I think section

8781, and when we do use it, applies to officers who are substandard and who are either guilty of gross negligence *or misconduct.* We do not place the officers we are discussing in connection with this legislation in the same category. *These officers are not associated with misconduct* or substandard performance." (p. 46)

B. *Hearings on S. 1795 Before the House Committee on Armed Services,* 86th Cong., 2nd Sess., March 16, 1960.

6. Congressman Kilday of Texas, Chairman of the Subcommittee, reported to the full House Committee on S. 1795. During the course of his report he noted, as found at pp. 3829 of the House Hearings, that:

> "*The stigma associated with the removal under this law. Since the majority of cases initiated under this law have involved gross inefficiency or misconduct, a definite stigma has attached to individuals removed under the law by the Air Force.* As a result, there has been a reluctance on the part of the Air Force to initiate removal action against officers whose sole deficiency has been a failure to perform their duties efficiently." (p. 3829)

7. In discussing the proposed provisions to grant authority to remove or retire officers for moral or professional dereliction, Congressman Kilday said, as found on pp. 3830, that:

> "The proposed new chapters 360 and 860 (sec. 3, p. 26; sec. 8, p. 39) will provide for the Army and Air Force, respectively, the authority to remove officers for moral or professional dereliction, or for security reasons.
>
> "The procedures for removal are similar to those proposed in the case of officers being eliminated for substandard performance of duty. *However, in view of the nature of the reasons for which removal is authorized by these chapters, the provisions differ in the following respects:*

"The officer will be informed of the charge or charges for which his removal is recommended, and is guaranteed at least 30 days' notice before the hearing.

"*With respect to officers who are being eliminated and who are not qualified for retirement, they may be discharged rather than honorably discharged* as is provided in the case of officers being eliminated for substandard performance of duty.

"General officers rather than colonels will comprise the membership of all the boards involved in this chapter." (p. 3830)

8. Testifying in support of his report, Congressman Kilday pointed out, at pp. 3832 of the Hearings, that:

"Another difficulty was that generally the existing provision had been used not to get the officer who was just substandard or perhaps he wasn't just doing everything that should be expected of a man of his grade and years of service. That fellow wasn't the one that they went after on this. *But it was the fellow that had been culpable in some respect, probably not subject to court-martial but still he had been guilty of some misfeasance or malfeasance and it wasn't just quite aggravated enough to justify a court-martial or perhaps not constituting the technical elements of an offense.*

"Well, because that has been the situation, we felt that it is not quite fair to put the man who is just a little below standard *before the same type of proceeding as the fellow who is culpable.*

"*So we have provided in this area in two separate sections: One for the man who is just substandard, and the other one who is more or less culpable. And as to the one where he is going out for cause, we have made that a good deal tighter than the other one. It is a board of general officers.*

"*Mr. Morris.* Speak just a little louder, please.

"*Mr. Kilday: I say, as to the one where it will cast a reflection on the man, we have placed more safeguards around it than we have in the other.*" (p. 3832)

9. Thereafter, an exchange ensued between Congressman Blandford and Congressman Carl Vinson, then Chairman of the House Armed Services Committee. As found at p. 3834 of the House Hearings, it reads:

"*Mr. Blandford.* This is existing law.

"*Now, the new one that is proposed, as a new chapter, involves an actual charge.*

"*The Chairman.* Charge?

"*Mr. Blandford.* Involves an actual charge, *or at least a much more specific charge.*

"And that is this:

"The Secretary of the Army——

and of course the Air Force, for its chapter——

may convene a board to review the record of any commissioned officer on the active list of the regular Army to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.

"Now, in that connection, we require in that person's case—not only that general officers make a recommendation that he go before a board, but that general officers sit on the board. And the general officers also sit on the board of review.

"In addition, we provide that the individual who has been required to show cause why he should not be retained——

will be entitled to be notified in writing of the charges against him at least 30 days before the hearing of his case by a board of inquiry which he is being required to show cause for retention on the active list.

"Now, you cannot be any more specific than that with regard to the chapter that we are dealing with there.

"Now, in the first chapter, you are dealing with a substandard performance, which is an efficiency rating and a series of efficiency ratings.

"*The other chapter involves a moral dereliction—*

alcoholism, drug addiction, or a variety of other causes, that may bring about the reason that the Secretary will ask him to come in and to establish why he should not be removed." (p. 3834)

10. At p. 3837 of the House Hearings, the exchange continued as follows:

"*The Chairman: Anyhow, you correct it by not making it an ex parte hearing.*

"*Mr. Blandford:* Yes, sir.

"*The Chairman: He has an opportunity to defend himself.*

"*Mr. Blandford:* Yes, sir.

"*The Chairman:* And he has——

"*Mr. Blandford:* This is one——

"*The Chairman: He has his day in court.*

11. Several Congressmen inquired of Mr. Kilday concerning aspects of the proposed bill. One of these exchanges, as found at pp. 3838-39, went as follows:

"*Mr. Hardy:* Mr. Chairman, does the language that we have finally worked out here prevent the elimination of officers who might have a basis of culpability or dereliction under the other procedures?

"*Mr. Kilday:* I don't believe I understood you.

"*Mr. Hardy:* Now——

"*Mr. Blanford:* I can——

"*Mr. Hardy: We are trying to distinguish here between removal for two reasons.* One, they don't come up to the standards; *and the other is there is some dereliction involved.*

"Now, have we, in the language we used and have got worked out, provided that officers who might be subject to removal for dereliction or culpability are not simply removed under the substandard provision?" (pp. 3838-39)

C. *Senate Report No. 571*, 86th Cong., 1st Sess., July 12, 1959.

12. At p. 6 thereof the Senate Committee Report states that:

> "The Department of Defense is of the opinion that the authority which would be provided by this bill is necessary and desirable to augment existing authority and procedures. The present show-cause procedure is not always effective in reaching the marginal officer. *In addition, the show-cause procedure is associated in the minds of many officers with factors other than quality of duty performance.*" (p. 6).

D. *House Report No. 1406*, 86th Cong., 2nd Sess., March 17, 1960.

13. At p. 10 of the House Report the following appears:

> "In the testimony before the Committee on Armed Services, it was revealed that the present 'show cause' procedure which is applicable to all Regular officers regardless of rank or length of service is cumbersome and unreasonably time consuming. Likewise, while the Army has used the 'show cause' procedure for officers who have failed to meet the standards prescribed for officers of their particular rank, *the Air Force has limited its application of this portion of the law to officers who have been charged with professional or moral dereliction or are considered to be security risks. Thus, the Air Force cannot utilize this chapter for the officer who fails to meet the standards prescribed by the Secretary because of the stigma attached to the procedure.*" (p. 10)

14. At p. 12 the House Report states:

> "During the committee hearings on S. 1795 it became obvious that the Army and Air Force have experienced difficulty in eliminating officers under the 'show cause' procedure under chapters 359 and 859 of title 10. These

chapters were originally enacted as title I of Public Law 810 of the 80th Congress and were intended to provide the Army and Air Force with a means of eliminating those officers whose performance of duty did not conform to standards prescribed by the Secretary. Thus existing law has been an effective tool in eliminating those officers whose performance of duty was grossly inefficient or whose conduct was such that their retention could not be tolerated. However, it has not been effective in removing those officers whose deficiency has been an inability to perform their duties in the manner expected of Regular officers of their grade and length of service.

"The principal difficulties experienced in administering the present law are the following:" (p. 12)

15. At p. 13 the House Report notes:

"The stigma associated with removal under this law. Since the majority of cases initiated under this law have involved gross inefficiency or misconduct, a definite stigma has attached to individuals removed under the law by the Air Force. As a result, there has been a reluctance on the part of the Air Force to initiate removal action against officers whose sole deficiency has been a failure to perform their duties efficiently." (p. 13)

16. Near the end of the House Report, at pp. 24-25 thereof, the Committee explains that:

"Subsection (a) amends title 10, United States Code, by inserting a new chapter 860, 'Separation From Regular Air Force for Moral or Professional Dereliction or in Interests of National Security,' after present chapter 859. The new chapter 860 would be administered completely separately from chapter 859 and would cover cases in which it is desired to separate an officer from the Regular Air Force because of moral dereliction or professional dereliction, or because his retention is not clearly consistent with the interests of

national security. *The new chapter provides a method for the removal of those kinds of officers that will not be confused with the system set forth in chapter 859 for the removal of substandard officers, since different standards must be applied to the differing kinds of cases.*" (pp. 24-25)

E. ***Extracts From The Debate In The House of Representatives.***

17. Congressman Kilday told the House (106 Cong. Rec. 6985):

> "We are providing now for two separate Boards of Officers to be convened. We believe this will cure one of the difficulties which has been encountered under the present provision of the Code. The present provision of the Code is so worded as to apply to the officer who has fallen below the standards of efficiency which should be required of him, as well as the officer who has been guilty of some dereliction. *In practice, and because of the language used in the regulations, the existing provision has been used mostly in those cases of dereliction such as chronic alcoholism, homosexuality, addiction to drugs, and things of that kind,* so that for practical purposes when you come to the fellow who is not quite giving the performance we ought to get from a man of his rank, there has been great reluctance to bring him before the Board, because if he is thrown out, *he has the same stigma attached to him as the one who was thrown out because of some dereliction. . . .*"

18. Congressman Kilday continued (106 Cong. Rec. 6986-87):

> "We have changed this to provide two different forms of Boards, one for the fellow who falls below the required efficiency; *the other one for the one who ought to be turned out of the service, yet is not guilty enough to be court martialed for a specific crime.*"

19. Replying to the question put by Congressman Meyers as to whether an officer who is charged as a security risk is to be given "no right to see the records that the Secretary uses," Congressman Kilday answered (106 Cong. Rec. 6986):

> "I will say to the gentleman, realizing the difficult operation in this [security] field, that I think his protection is the same as it is elsewhere, except that experience seems to show that the one whose security is at least suspect becomes the hardest of all to eliminate from the service. . ."

20. Finally, Congressman Bennett of Florida closed the debate (106 Cong. Rec. 6987):

> "Mr. Chairman, as a member of the subcommittee that considered the bill, *I would like to emphasize the safeguards we included in the bill.* . ."
>
> . . . . . .
>
> "Each officer being considered for removal under the permanent part of the law [10 U.S.C. 8791, *et seq.*] is guaranteed the opportunity of a 'full and fair hearing' and a review by a subsequent and disinterested Board, with final approval authority invested in the Secretary . . . *The right of confrontation* and access to all evidence *is guaranteed in every case except in those few instances* where an officer is being considered for removal *because his continued retention would endanger national security.* In those cases, it is specifically required that the officer be furnished a summary of any information or evidence which is withheld from him."